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Walking the Walk

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Book Reviews

JOHN A. SPANOGLE, JR., MICHAEL P. MALLOY, LOUIS F. DEL DUCA, KEITH A. ROWLEY, & ANDREA K. BJORKLUND, GLOBAL ISSUES IN CONTRACT LAW (Thomson/West, 2007)

*Reviewed by Janet Koven Levit**

WALKING THE WALK

While globalization undoubtedly sculpts economic, political and social spheres in potent ways, it also beckons change in legal education. Within the past decade, legal academia began acknowledging globalization as a challenge to "business as usual" in U.S. law schools.[1] While challenges demand solutions, appropriate solutions are not always self-evident, and legal academics have engaged in significant "talk" of "globalizing" legal education. Yet, follow-up action has been limited. *Global Issues in Contract Law* is a praiseworthy undertaking by luminaries in the contracts and commercial law fields in that it "walks the walk" and does not merely "talk the talk."

This book review will briefly canvas diverse approaches to "globalizing" legal education as a means to contextualize *Global Issues in Contract Law* and to identify the principles that presumably animated the book. It will then briefly describe the coverage, cadence and flow of *Global Issues in Contract Law.* Finally, the review will assess whether the "walk" on which *Global Issues in Contract Law* embarks will effectively meet the book's and authors' objectives.

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1. *See* Gerald Torres (then President of AALS), *Integrating Transnational Legal Perspectives into the First Year Curriculum*, 23 PENN. ST. INT'L L. REV. 801 (2005); Justice Sandra Day O'Connor, Keynote Address at the Southern Center for International Studies 3 (Oct. 28, 2003) (transcript available at *http://www.southerncenter.org/OConnor_transcript.pdf*) ("Law schools must ensure that their students are well-versed in the increasingly international aspects of legal practice. Some schools have already taken up the challenge: For example, NYU Law School has brought foreign law professors to the United States to share their expertise and perspectives; Yale has established a seminar for members of constitutional courts from around the world; and the Michigan Law School requires all students to complete a two-credit course in transnational law.").

I. COMPETING APPROACHES TO "TRANSNATIONALIZING" LEGAL EDUCATION

Most in legal academia recognize that globalization impacts the way that we should teach law. Yet, for the most part, this recognition has led to the creation of an atomistic patchwork of programs and curricular changes rather than deliberate school-by-school or academy-wide strategies. Some law schools have answered globalization's call by bolstering their international offerings and programming: summer study abroad programs mushroomed; "international" curricular offerings grew exponentially; and human rights clinics and international law centers assumed prominent roles within law schools. Other schools viewed relegating the "international" to the realm of the "optional" or "extracurricular" as sub-optimal. Thus, some law schools chose to mandate that all students take an "international" class during their law school tenure, or even during their first year.

In the view of many legal academics, as well as prominent members of the judiciary and bar,[2] globalization demands a more pervasive change in legal education. These academics view this "global" moment as reminiscent of the New Deal era, a time when the growth of the federal administrative state prompted lawyers—and thus law schools—to turn their gaze from the "law of the state in which their firm was located" (p. 1) to federal and/or uniform law.[3] Thus, many law professors now advocate transnationalization of the law school, not merely at the fringes but in a way that alters the law school's fundamental educational mission; in their view, for instance, to treat the transnational component of contract law only in an international business transactions class is to relegate exposure to that which is "transnational" to those law students who have already formed preconceived interests in international law.

These academics therefore believe that law schools should weave "transnational perspectives" throughout the curriculum, offering students a seamless, subject-by-subject overview of local, state, national, and international law. In this vein, the American Association of Law Schools (AALS) sponsored a workshop at its 2006 Annual Meeting, entitled "Integrating Transnational Legal Perspectives into the First Year Curriculum."[4] This workshop spawned a lot of talk and ambitious ideas, yet there was little in the form of institutionalized follow-up action. Recently, however, discrete groups of professors, with support from major textbook publishers, have started to "walk the walk," developing a series of supplemental texts for the core law school cur-

2. Charles Lane, *The Court is Open for Discussion*, WASH. POST, page A01, Jan. 14, 2005 (quoting Justice Breyer while debating Justice Scalia on the use of foreign law in constitutional jurisprudence: "'This world we live in is a world where it is out of date to teach foreign law in a course called Foreign Law'").

3. *See also* Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT'L L. 305, 308 (2001).

4. Association of American Law Schools, Workshop on Integrating Transnational Legal Perspectives Into the First Year Curriculum (Jan. 4, 2006), *http://www.aals.org/am2006/program/transnational/index.html*. *See generally Transnational Legal Education,* 56 J. LEGAL EDUC. (2006) (collection of resulting articles).

riculum. These texts purport to offer professors a "turn-key" method of transnationalizing their courses. *Global Issues in Contract Law* is part of one such series, Thomson/West's Global Issues Series, which itself grew out of a laudable McGeorge School of Law workshop initiative.[5]

Against this backdrop, *Global Issues in Contract Law*'s "modest objective" of ensuring that "law students will graduate at a minimum with a solid understanding of the basic principles that govern contracts undertaken in a globalized environment" (p. v) makes perfect sense. To unpack this objective is to identify three tenets that presumably guided the *Global Issues* project: 1) interpenetrating legal systems: globalization has left an indelible imprint on commercial relationships, spawning a body of law in which the "domestic" is inextricably intertwined with the "international;" 2) audience: legal educators should introduce *all* law students to global legal issues by mainstreaming the "transnational" within introductory, first year, universally required classes; and 3) form: the way to reach the audience is to offer contracts professors, many of whom are not "internationalists" per se, such transnational perspectives in a prepackaged, easily adoptable, relatively concise form that will engage students. The remainder of this review will assess whether the authors' finished product in fact furthers these principles.

II. GLOBAL ISSUES IN CONTRACT LAW

In drafting *Global Issues in Contract Law*, the authors seemingly made two fundamental editorial decisions: 1) to structure the book in the tradition of a classic, law school casebook; and 2) to limit the substantive scope, favoring in-depth coverage of one or two "global issues" over more superficial coverage of a wider array of global issues. While these editorial decisions are logical, and are decisions that I might have made myself in structuring the book, they may undermine, or at least slow, *Global Issues in Contract Law*'s furtherance of the authors' explicit and implicit objectives.

First, *Global Issues in Contract Law* reads, in form and substance, like a classic law school casebook. The cadence is case–notes–case–notes, with some, although relatively limited, connecting material, and the purpose of cases is to draw out and apply legal rules. Thus, the book is decidedly neither a treatise nor an "alternative" problem-oriented or drafting text.[6] Its style is thus "business as usual" for law students. Second, as a text, *Global Issues in Contract Law*'s substantive focus is the Convention on Contracts for

5. *See* University of the Pacific McGeorge School of Law, Globalizing the Curriculum Initiative, *http://www.mcgeorge.edu/international/global/globalizing/*. Aspen Publishers are developing a similar project in conjunction with the S.J. Quinney College of Law at the University of Utah. *See* http://www.law.utah.edu/news/show-news.asp?NewsID=61.

6. Admittedly, in its final chapter on remedies, *Global Issues in Contract Law* takes a turn toward a treatise style (pp. 137-81). Additionally, in a few instances, the authors develop illuminating problems in the notes (pp. 74-75).

the International Sale of Goods (CISG), although the authors weave some comparative contract law into the text as well,[7] principally through discussion of the UNIDROIT Principles. The authors acknowledge, implicitly and explicitly, other "global issues" in contract law, such as payment systems and international arbitration (pp. v, 97-98, 100-02), but in the name of form (brevity) and audience (*all* law students), they understandably opt to highlight the piece of international law that is already firmly incorporated into "basic, globalizing federal law" (p. 2).

Within this narrow purview, the authors highlight those issues that create the most substantive overlap and/or conflict with the UCC and the common law, the two sources of contract law typically at the heart of a first-year contracts class: contract formation,[8] contract interpretation,[9] performance/breach,[10] and remedies.[11] Pedagogically, these choices are sound, for parsing distinctions between the different sources of law effectively reinforces legal rules. For example, in contrasting the UCC's approach to the "battle of the forms" and the CISG's "mirror image rule," and in applying each approach to a single set of facts, students grapple with difference, nuance, and legal consequences at a functionally deep and meaningful level—a level that students do not always access when learning a single legal rule or perspective.

III. In Furtherance of Stated Objectives?

Will *Global Issues in Contract Law* satisfy its goal of creating a tightly packaged, easily adoptable vehicle to inculcate in all law students a working sense of interdependent and intertwined legal systems? In attempting to answer that question, I will examine some ways in which the text's editorial decisions—its scope and its layout —are in tension with the book's critically important animating goals.

Consider the implications of the first editorial decision—to structure the book as a casebook, rather than as a treatise, on the one hand, or a problem-centered book or set of drafting exercises, on the other hand. The nominal length of *Global Issues in Contract Law* (181 pages) is not, in itself, a significant problem. I assign approximately 20-25 pages per class hour; thus, the entirety of *Global Issues* represents approximately eight hours of class time, ostensibly a reasonable amount of time to dedicate to a body of law that governs an overwhelming majority of short-term, international trade contracts.

7. Pp. 72-73 (comparative procedure and jury trials); 77-80 (*pacta sunt servanda* as foundation for contract enforcement); 85-95 (UNIDROIT Principles, German law, and French law on specific performance); 179-81 (mitigation of damages).

8. Pp. 17-53, 73-74, 75-76 (offer, acceptance, "formal" writing requirements, merchant confirmations, "battle of the forms", irrevocable offers).

9. *Global Issues in Contract Law* ch. 2, at 53-73 (parol evidence, parties' subjective intent).

10. Pp. 77-135 (*pacta sunt servanda*, efficient breach, right to performance, hardship, fundamental breach).

11. Pp. 136-81 (agreed remedies, specific performance, fundamental breach, avoidance, monetary damages).

Nonetheless, in practice, many contracts professors will have difficulty dedicating the eight hours necessary to cover *Global Issues in Contract Law*. Many seasoned contracts professors remember the days when the introductory contracts class was six hours, spanning two semesters; today, most contracts professors teach the introductory contracts course in one semester, either in four (56 hours) or even three (42 hours) credits. First-semester, first-year students arrive in class overwhelmed, and terms like "plaintiff," "defendant," and "summary judgment"—let alone "consideration," "offer" and "acceptance"—have not yet entered the students' lexicon. Thus, while the target may be 20-25 textbook pages per class hour, the pace during the first weeks of class is palpably slower. Almost all contracts professors complain of a significant substantive crunch at the semester's conclusion. I, for one, spend very little class time on remedies; other colleagues give scant attention to Article 2 of the UCC.

So, in order for professors to incorporate more material—and more text—they would have to view each incremental page, each incremental point of law, as significant value added. With that in mind, the authors might have structured *Global Issues in Contract Law* in a tighter and more succinct manner. Whereas one case, with skilled use of note material, could adequately illustrate a CISG rule, or application thereof, the authors often include two or more cases.[12] Whereas opinions often discuss the CISG in discrete sections, the authors tend to be light on the editing of cases, often forcing the reader to wade through lengthy portions of opinions that illuminate little of the CISG provision at hand.[13] And, presumably because there was division of labor among the many authors, the text at times is unnecessarily repetitive.[14] For these reasons, the choice of a casebook structure may have led to a text that is significantly more dense and cumbersome than initial appearances and length suggest. Thus, contracts professors would likely have to edit *Global Issues* themselves, prior to assigning it to students—undermining the "form" objective of offering professors a tight, turn-key, easily-adoptable package that would require minimum investment of time and resources.[15] It may be professors who are already "internationalists" themselves, who are

12. For instance, the authors include four cases on the nuances of offer and acceptance under the CISG (pp. 17-31) and two cases on the CISG's approach to parol evidence (pp. 53-71).

13. *See, e.g.*, excerpts from Calzaturificio Claudia S.N.C. v. Olivieri Footwear Ltd., 1998 WL 164824 (S.D.N.Y. 1998) (pp. 38-51) (in section discussing formal contract formation requirements, principally writing requirement (or lack thereof), authors do not excise extensive discussions of parol evidence or applicability or choice of law, issues that illuminate facets of the CISG but which are discussed in other sections of the text) and Downs Investments P/L v. Perwaja Steel SDN BHD, [2001] QCA 433 (Supreme Court of Queensland, Australia) (pp. 121-31) (including discussion of equitable principles in a case designed to illustrate the CISG's fundamental breach principle).

14. For instance, the discussion of "fundamental breach" and "specific performance" (pp. 141-60) feel somewhat redundant given the discussion of "fundamental breach" and "performance under the CISG" (pp. 103-31).

15. This problem will likely be ameliorated a bit when the promised teacher's edition is published.

more or less familiar with the material and could, without much effort, "edit" the book through carefully tailored assignments in order to present students with a manageable body of material, who will have the easiest time of this.

Furthermore, the casebook format of *Global Issues in Contract Law* may not energize and actively engage students as much as other formats would. The text does little to break the rhythm or, from the law students' perspective, monotony, of the opinion-by-opinion roll-out of contract principles, a rhythm that almost all contracts professors and text book authors follow. And conventional wisdom in legal academia now suggests that variety in teaching styles—from lecture to Socratic discourse to visual presentation to practical problems—enhances teaching effectiveness. Consider a "global issues" supplement that packaged a contract negotiation exercise, walking students through the concept of choice of law, the CISG's transaction-by-transaction opt-out provision, and the effective (and ineffective) ways to draft a choice-of-law clause that best meets clients' interests. Such an approach would simultaneously diversify pedagogy, inject a transnational perspective, and offer students "practical" skills training from the perspective of a transactional lawyer rather than a litigator. In my view, the benefits from such an exercise(s) would outweigh any hard costs (purchasing an additional text) and soft costs (detracting from coverage of other subjects and adding density and complexity to an already difficult introductory class) of assigning additional materials.

If professors do not adopt *Global Issues in Contract Law* for class usage, then the "audience" objective—providing *all* law students with global perspectives on contract law—also remains unmet. Or does it? While one way to reach all law students is to assign them the *Global Issues* book, another is to sensitize all contracts professors—many of whom are not familiar with issues of international law—to transnational issues. This would enable them to weave transnational issues into their course, either by assigning one or more of the cases that the authors excerpt, or by highlighting how case outcomes would change if the facts provided for a *transnational* contract, or by assigning certain portions of the CISG alongside analogous provisions of the Restatement or UCC. With respect to this function—teaching professors how to teach law students—the choice of casebook format is less consequential.

Consider also the implications of the second editorial decision—to narrow the scope of coverage to the CISG, and a bit of civil law. On one level, this editorial decision may have contributed to the problems discussed above—with greater breadth of coverage, the authors may simply not have "had room for" redundant or unnecessary material. At a more fundamental level, in essentially limiting *Global Issues in Contract Law*'s coverage to the CISG, the authors fail to illustrate the extent to which various legal systems and cultures converge within a transnationalized body of contract law. Even if the CISG does not apply to a contract—perhaps because the contract is "domestic," perhaps because the parties have opted out, or perhaps

because the parties' principal places of business are in countries that are not party to the CISG—transnational laws and norms live within most contracts. Consider for example the INCOTERMs, convenient abbreviations that allocate an array of responsibilities, tasks and risks among buyer and seller and are embedded in almost every sales contract—domestic or transnational. The INCOTERMs are the fruit of the International Chamber of Commerce—they are neither treaty nor inter-governmental agreement, but the rules potently shape contract terms and disputes. Likewise, consider arbitration clauses, critical to many contracts because, due to the New York Convention on Recognition and Enforcement of Arbitral Awards, arbitration is the preferred dispute resolution route in cross-border transactions. Thus, as some of the cases in the book demonstrate, many contract disputes ensue before arbitral institutions—including the American Arbitration Association, the International Chamber of Commerce's International Court on Arbitration, and the London Court of International Arbitration—and are subject to the respective institution's jurisdictional, procedural, and interpretive rules.

To limit the book's substantive scope to the CISG—admittedly for pragmatic considerations—is implicitly to offer a rigid, rather formalistic view of what it means for contracts law to be "global" or "transnationalized." This plays into the tendency of students, which I have observed in my experience teaching the CISG in the introductory contracts class,[16] to create a mental (or literal) matrix—after determining the nationality of parties, the location(s) of the transaction, and the nature of the transaction (goods v. services), students place any particular problem or case within one of three boxes (CISG, UCC or Restatement) and apply the respective legal "regime" with little consideration of the others. In other words, students still view legal systems—in this case state, national, and international—as hermetically sealed off from each other. Those of us who are more familiar with the CISG recognize that this type of matrix is overly simplistic, overlooking nuance and detail that permeates boundaries. Our contract law is transnational not merely because a treaty trumps the UCC in certain circumstances, but also because of less formal, less recognizable gentlemen's agreements, understandings, codes, and practices—because the "trade practices and customs" to which our "local" contract law defers have themselves become "global." While *Global Issues in Contract Law* reminds us that any particular CISG case, to the extent that it touches on issues of contract validity, will also be subject to "local" law (p. 52), its focus on the CISG may feed the temptation to segregate rather than integrate different legal systems.

16. I currently include excerpts from Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F.Supp. 1229 (S.D.N.Y. 1992), reprinted in *Global Issues in Contract Law* at 17-21, and MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A., 144 F.3d 1384 (11th Cir. 1998), reprinted in *Global Issues in Contract Law* at 60-71. I chose these two cases on the basis of a very useful law review article regarding ways to incorporate the CISG into a contract class, William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL EDUC. 72 (2000).

IV. Conclusion

This review has focused on some ways in which the book's structure might undermine its important pedagogical goals. Yet *Global Issues in Contract Law* is fundamentally and unquestionably an invaluable contribution to contracts law and to the broader "transnationalization" project. This group of authors deserves much praise for distilling legal academia's transnationalization "talk" and converting it into a "walk" with direction and destination. These authors do not simply ask the question—what would a transnationalized curriculum look like?—but produce a concrete answer. For those of us who believe that "transnationalization" demands a reassessment of our approach to legal education, *Global Issues* critically tests our underlying assumptions and channels future "talk" and "walk" in productive directions. And for this contribution, we are deeply grateful.